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Analysis of Security Contractors in Deployed Environments

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December 2006

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The unexpected strength of the Iraq insurgency has created an unstable and unsafe environment that makes it difficult for the U.S. forces to operate and transfer security responsibilities to the new Iraqi government.¹ To deal with this issue, the Department of Defense (DoD) has deemed it necessary to increase the role of private military contractors, rather than increasing the total number of military troops on the ground. Several dilemmas arise contractually when you hire privatized military firms to conduct military functions. This Masters of Business Administration (MBA) project will analyze consequences of the DoD decision to outsource security contractors in Iraq. Specifically, we will look at the contracting and legal ramifications of outsourcing this inherently governmental occupation. Our research will 1) Discuss the strengths and weaknesses of the government's decision to outsource commercial contractors for security force operations in Iraq, 2) Identify and discuss any potential trends that impact contractual and legal issues involving security force contractors, 3) Lay the foundation and provide recommendations for future analysis of relations between security force contractors and the government.

¹ United States: Government Accountability Office. Rebuilding Iraq: Enhancing security, measuring program results, and maintaining infrastructure are necessary to make significant and sustainable progress. Washington: October, 2005.

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ANALYSIS OF SECURITY CONTRACTORS IN DEPLOYED ENVIRONMENTS

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Submitted in partial fulfillment of the requirements for the degree of

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ANALYSIS OF SECURITY CONTRACTORS IN DEPLOYED ENVIRONMENTS

ABSTRACT

The unexpected strength of the Iraq insurgency has created an unstable and unsafe environment that makes it difficult for the U.S. forces to operate and transfer security responsibilities to the new Iraqi government¹. To deal with this issue, the Department of Defense (DoD) has deemed it necessary to increase the role of private military contractors, rather than increasing the total number of military troops on the ground. Several dilemmas arise contractually when you hire privatized military firms to conduct military functions. This Masters of Business Administration (MBA) project will analyze consequences of the DoD decision to outsource security contractors in Iraq. Specifically, we will look at the contracting and legal ramifications of outsourcing this inherently governmental occupation. Our research will 1) Discuss the strengths and weaknesses of the government's decision to outsource commercial contractors for security force operations in Iraq, 2) Identify and discuss any potential trends that impact contractual and legal issues involving security force contractors, 3) Lay the foundation and provide recommendations for future analysis of relations between security force contractors and the government.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
I. INTRODUCTION.....	3
A. BENEFITS OF RESEARCH.....	3
B. RESEARCH OBJECTIVE	3
C. RESEARCH QUESTIONS	4
D. SCOPE AND ORGANIZATION	4
E. METHODOLOGY	5
II. DEFINITIONS AND BACKGROUND	7
A. DEFINITIONS	7
B. HISTORY OF CONTRACTORS IN THE BATTLEFIELD	9
1. Early Beginnings	9
2. Privatization Revolution.....	9
3. Why has Security Been Privatized	11
C. CHAPTER SUMMARY.....	11
III. CONTRACTUAL DILEMMAS FACING DOD SURROUNDING THE USE OF SECURITY FIRMS	13
A. INTRODUCTION.....	13
B. COMPETING INTERESTS	14
C. MONITORING AND OVERSIGHT	16
D. COMMAND AND CONTROL CONCERNS	18
E. CHAPTER SUMMARY.....	21
IV. ANAYLSIS OF LEGAL ISSUES INVOLVING THE EMPLOYMENT OF SECURITY FIRMS	23
A. INTERNATIONAL LAWS AFFECTING SECURITY FIRMS	23
B. LEGAL AUTHORITY OVER SECURITY FIRMS.....	28
C. CHAPTER SUMMARY.....	31
V. CONCLUSIONS AND RECOMMENDATIONS.....	33
A. INTRODUCTION.....	33
B. CONCLUSIONS	33
1. Monitoring and Oversight Issues	33
2. Command and Control.....	34
3. Divided Loyalties.....	34
4. International Laws Affecting Security Firms.....	35
5. Legal Authority over Security Firms	35
C. RECOMMENDATIONS.....	35
1. Reforming and Streamlining Contingency Contracting	35
2. Proper Training and Education	36
3. Improve Overall Contract Visibility	37
4. Regulations on Both the National and International Levels.....	38
D. SUMMARY	39

LIST OF REFERENCES.....	41
INITIAL DISTRIBUTION LIST	45

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— Jennifer F Herron, Capt, USAF

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— Gregory Santiago, Capt, USAF

EXECUTIVE SUMMARY

The unexpected strength of the Iraq insurgency has created an unstable and unsafe environment that makes it difficult for the U.S. forces to operate and transfer security responsibilities to the new Iraqi government². To deal with this issue, the Department of Defense (DoD) has deemed it necessary to increase the role of private military contractors, rather than increasing the total number of military troops on the ground. Several dilemmas arise contractually when you hire privatized military firms to conduct military functions. This Masters of Business Administration (MBA) project will analyze consequences of the DoD decision to outsource security contractors in Iraq. Specifically, we will look at the contracting and legal ramifications of outsourcing this inherently governmental occupation. Our research will 1) Discuss the strengths and weaknesses of the government's decision to outsource commercial contractors for security force operations in Iraq, 2) Identify and discuss any potential trends that impact contractual and legal issues involving security force contractors, 3) Lay the foundation and provide recommendations for future analysis of relations between security force contractors and the government.

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I. INTRODUCTION

A. BENEFITS OF RESEARCH

With the United States military undermanned and struggling to meet recruiting and deployment demands in Iraq, outsourcing contractors to provide security support has become a billion dollar industry. Outsourcing military operations to private contractors is nothing new but it has never been accomplished on such a large of scale in our nation's history. With operations this size and growing, and the amount of money spent to support this function, we must take a deep look and evaluate the current situation to determine if we should continue down this path. We will examine both the positive and negative effects of this controversial service from both contracting and legal implications. The research accomplished in this MBA project will help acquisition professionals in the DoD gain a better understanding of common problems encountered (both legal and contractual) and situations to be aware of in outsourcing security forces contracts in Iraq.

B. RESEARCH OBJECTIVE

With Iraq on the brink of civil war and daily terrorist and secular attacks causing public strife, contracting out security force operations in Iraq is a critical component to the operational success of the U.S. stabilizing Iraq's security. The biggest quandary facing the DoD's decision to contract this function is the lack of regulation or sufficient oversight to adequately monitor these private military firms (PMFs). It is an industry that is growing exponentially and needs to be monitored to prevent future cases of fraud, waste and abuse. This research will examine several issues dealing with the DoD hiring these PMFs for operations in Iraq. Specifically, this research will examine contracting dilemmas and legality concerns with outsourcing security force operations. It will also identify the different motivations and reasons that the DoD out-sources and explain why the sudden growth of the private military corporations. Finally, we will discuss numerous possible recommendations to better provide management and oversight to this growing

industry. Our goal with this project is to highlight the problems that arise when you employ PMFs and provide recommendations that can aid in future acquisition decision making.

C. RESEARCH QUESTIONS

The primary issue we are addressing in this MBA project is as follows: What are the DoD's significant issues concerning outsourcing contractors for security operations in Iraq? What are the long-term effects and concerns affecting the military in relying so heavily on these private firms? The supplementary questions are as follows:

- How did the private military industry grow?
- Why do we outsource security force operations in Iraq?
- What contracting dilemmas arise when you contract out security functions in Iraq?
- What are the effects of domestic laws of private military firms?
- What are the international law implications on these companies?
- How does the military justice system affect the use of private security contractors?

By discussing of these questions, our research will bring attention to several key issues effecting the government decision to outsource security services in Iraq.

D. SCOPE AND ORGANIZATION

The scope of this MBA project is to address several issues and concerns facing the DoD decision to outsource security operations in Iraq. We intend to gather research to identify the strengths and weakness of outsourcing security forces personnel in Iraq, analyze and recognize of significant trends that are the root causes of contractual and legal problems affecting the acquisition framework of outsourcing security, and to lay a foundation for building a body of knowledge for future research involving outsourcing security force operations in Iraq.

Our project is organized into five parts that deal with the central theme of identifying contractual and legal concerns in outsourcing security operations. Chapter I begins our paper by discussing the benefits of our research, research objectives, research questions, scope and organization, and methodology. Chapter II goes more into the background, history of PMFs and details why the government has allowed security functions to be commercially privatized. Chapter III examines the contractual problems that occur when these firms are hired. Specifically, this chapter looks at competing interests of the government and hired company, oversight and monitoring, and command and control. Chapter IV studies the legal impact and effect of PMFs regarding domestic laws, international laws and applicability of criminal justice procedures. Lastly, chapter V analyzes the impacts of all these issues and discusses the pros and cons of using this service. This Chapter ends by providing several recommendations and conclusions to help regulate this industry and prevent future abuses.

E. METHODOLOGY

Our methodology in this MBA project includes a comprehensive investigation of previous articles, books, research, Government Accounting Office (GAO) reports, Congressional Research Service (CRS) reports for Congress, Uniform Code of Military Justice (UCMJ) documents, Federal Acquisition Regulation (FAR) (including any applicable supplements), Geneva Convention of 1949, and other periodicals related to the subject of employing private military firms in Iraq. By analyzing of the above mention sources, we will propose a framework for future similar research. In addition, we will lay a foundation for building a body of knowledge to enable larger-scale conclusions to be drawn regarding outsourcing security personnel in deployed environments.

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II. DEFINITIONS AND BACKGROUND

A. DEFINITIONS

PMF = Private Military Firm

“Business organizations that trade in professional services intricately linked to warfare. They are corporate bodies that specialize in the provision of military skills, including combat operations, strategic planning, intelligence, risk assessment, operational support, training, and technical skills.”³

CPFF = Contract, Cost-Plus-Fixed Fee

“A cost reimbursement type contract which provides for the payment of a fixed fee to the contractor. The fixed fee, once negotiated, does not vary with actual cost, but may be adjusted as result of any subsequent changes in the scope of work or services to be performed under the contract.”⁴

CPIF = Contract, Cost-Plus-Incentive-Fee

“A cost reimbursement type contract with provision for a fee which is adjusted by formula in accordance with the relationship which total allowable costs bear to target costs. The provision for increase or decrease in the fee, depending upon allowable costs of contract performance, is designed as an incentive to the contractor to increase the efficiency of performance.”⁵

CPPC = Contract, Cost-Plus-Percentage-Of-Cost

“A form of contract formerly used but now illegal for use by DoD which provided for a fee or profit as a specified percentage of the contractor's actual cost of

³ P. W. Singer. (2003). *Corporate Warriors: Rise of the Privatized Military Industry*. London: Cornell University.

⁴ “Contract, Cost-Plus-Fixed Fee” Defense Acquisition University Glossary of Defense Acquisition Acronyms and Terms, 12th Edition.

⁵ “Contract, Cost-Plus-Incentive-Fee” Defense Acquisition University Glossary of Defense Acquisition Acronyms and Terms, 12th Edition.

accomplishing the work to be performed. Sometimes referred to as a 'cost-plus' or 'percentage-of-cost' contract."⁶

FFP = Contract, Firm Fixed Price

"Provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This type of contract places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. Provides maximum incentive for the contractor to control costs, and imposes a minimum administrative burden on the government."⁷

FPIF = Contract, Fixed Price Incentive Firm

"Uses an incentive whereby the contractor's profit is increased or decreased by a predetermined share of an overrun or underrun. A firm target is established from which to later compute the overrun or underrun. A ceiling price is set as the maximum amount the government will pay. Necessary elements for this type of contract are: target cost - best estimate of expected cost; target profit - fair profit at target cost; share ratio(s) - to adjust profit after actual costs are documented; and, ceiling price - limit the government will pay."⁸

CO = Contracting Officer

"A person with authority to enter into, administer, and/or terminate contracts and make related determinations and findings for the United States Government (USG)."⁹

MEJA = Military Extraterritorial Jurisdiction Act

MEJA states the circumstances and procedures for prosecution of military members and the civilian members who accompany them, while outside the U.S.

⁶ "Contract, Cost-Plus-Percentage-Of-Cost" Defense Acquisition University Glossary of Defense Acquisition Acronyms and Terms, 12th Edition.

⁷ "Contract, Firm Fixed Price" Defense Acquisition University Glossary of Defense Acquisition Acronyms and Terms, 12th Edition.

⁸ "Contract, Fixed Price Incentive Firm" Defense Acquisition University Glossary of Defense Acquisition Acronyms and Terms, 12th Edition.

⁹ "Contracting Officer" Defense Acquisition University Glossary of Defense Acquisition Acronyms and Terms, 12th Edition.

B. HISTORY OF CONTRACTORS IN THE BATTLEFIELD

Prior to the 2003 invasion of Iraq, armed civilians providing security work was not well known. Today, it is a way of life. The use of civilians to assist Coalition forces throughout Iraq has gotten a lot of publicity in recent years. It might be tempting to suggest the war in Iraq and cutbacks in U.S. Active Duty numbers led to the growth of these hired guns. A look at the earliest beginnings of privatized security can help explain why PMFs have seen such a big boom in recent years.

1. Early Beginnings

Privatized security dates back many centuries. The first believed ruler to employ private citizens to provide security is Ur's King Shulgi, who incorporated mercenaries into the Army from 2094-2047 BC. The Battle of Kadesh of 1294 BC is the first battle with much detail. The battle was between the Hittites and the Egyptians, whose fighting forces including hired Numidians. Carthage used private soldiers in both Punic Wars (264-241 BC and 218-202 BC). Private soldiers did not organize themselves into formal companies until after the Hundred Years War (1453 AD). Since soldiers were unable to find work and had no place to live and no careers other than war-fighting, they joined together and formed "companies". These companies were intended to help the soldiers find work, or if nothing else, help the soldiers provide for each other.¹⁰ The numbers and impact of private fighters has fluctuated since then.¹¹

2. Privatization Revolution

Since the end of the Cold War, three countries illustrated the positive benefits of privatized military: Sierra Leone, Croatia and Bosnia. In Sierra Leone, civil war broke out in 1991. By 1995, rebels moved the country to a state of anarchy. As the rebels approached Freetown, they were surprised when they were hit with a strong and precise

¹⁰Col Gerald Schumacher, United States Army (retired). (2006). *A Bloody Business: America's War Zone Contractors and the Occupation of Iraq*. St Paul, Minnesota: Zenith Press.

¹¹ P. W. Singer. (2003). *Corporate Warriors: Rise of the Privatized Military Industry*. London: Cornell University.

fighting force. After two weeks, the rebels could not fight off the attack and deserted Freetown. The rebels' opponents finished off the rebellion and restored stability to the country. The people of Sierra Leone soon learned they owed their country's peace to the South African private firm Executive Outcomes.

Beginning in 1991, the world watched as 200,000 people were "ethnically cleansed" in Bosnia and Croatia. In 1995, Croatia took the Serbs by surprise with a Western-style offensive, which was so successful Bosnia's Serbs were also defeated. The end of the war is credited to the intervention of Military Professional Resources Incorporated (MPRI), based in Alexandria, Virginia. PMF business has exploded all across the world. In Africa, over 80 firms have provided assistance to the war in Angola. Asia, Papua New Guinea, Taiwan, Cambodia and the Philippines all look to PMFs for services such as Army training. In the Western Hemisphere, PMFs have fought drug cartels in Colombia and Mexico. In Haiti, PMFs train and deploy the Haitian National Police, and protect high-ranking officials and their families.¹²

According to Singer,¹³ the U.S. Department of Defense granted over 3,000 contracts between 1994–2002. Some of these include:

- Airscan, who provides protection for USAF & NASA launch facilities
- Braddock Dunn & McDonald (BDM), who provides training for various aspects of military intelligence and special operations
- Betac International Corporation, who has been known to work with U.S. Special Operations Command
- MPRI, who provides the Army with force management for various training programs, including the Reserve Officer Training Corps (ROTC) program

There is no way to say any one country or situation has given rise to so much use of PMFs – countries recognize the valuable talents PMF employees have and put that knowledge to work. It is clear the use of PMFs was virtually guaranteed to play a role in the rebuilding efforts in Iraq, even before the invasion began.

¹²Col Gerald Schumacher, United States Army (retired). (2006). *A Bloody Business: America's War Zone Contractors and the Occupation of Iraq*. St Paul, Minnesota: Zenith Press.

¹³ P. W. Singer. (2003). *Corporate Warriors: Rise of the Privatized Military Industry*. London: Cornell University.

3. Why has Security Been Privatized

The end of the Cold War proved to be very profitable for PMFs.¹⁴ Countries the world over, including the U.S., have been major customers of the knowledge, skills, and expertise of PMF employees. PMFs have thrived as the number of DoD active duty personnel has declined, picking up tasks and duties the military no longer has enough personnel to handle. PMFs contribute by providing various forms of “security” functions across Iraq, from providing building security throughout the country, to escort protection for high-ranking Coalition and Iraqi officials, to protecting convoys as they deliver supplies and personnel.

C. CHAPTER SUMMARY

The history of privatized security dates back to the earliest times of human history – it has stood the test of time, proving to be invaluable to nations pursuing defense, or even the global community trying to protect innocent lives. Since the end of the Cold War, the U.S. has moved toward a smaller military and has looked to private contractors to provide those services. The PMF industry has risen to meet the growing needs of the U.S. and the world for specialized private security companies. This growth has led to a variety of contracting questions that need to be addressed.

¹⁴ Deborah Avant. (2004) “Mercenaries.” Foreign Policy (July/August): 20-26.

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III. CONTRACTUAL DILEMMAS FACING DOD SURROUNDING THE USE OF SECURITY FIRMS

A. INTRODUCTION

The unexpected strength of the Iraq insurgency has created an unstable and deadly contingency environment that makes it difficult for U.S. forces to operate and transfer security responsibilities to the new Iraqi government.¹⁵ To deal with this issue, the DoD has deemed it necessary to increase the role of private military contractors rather than increasing the total number of military troops on ground. But several dilemmas arise contractually when the government hires privatized military firms to conduct military functions.

To aid in our research of identifying such contracting dilemmas with private military firms, we turned to P.W. Singer's work in his book titled *Corporate Warriors: The Rise of the Privatized Military Industry* for guidance. In this 2003 book, he discusses several key contractual issues and concerns facing the government's decision to employ private military firms. In this chapter, we will explore the three main contractual dilemmas discussed in his book affecting the acquisition community in Iraq. These issues are 1) the competing interests of the private military companies and the companies' government, 2) oversight and monitoring concerns, 3) command and control problems. "Occupying Iraq will be the most daunting and complex task the U.S. and the international community will have undertaken since the end of World War II."¹⁶

¹⁵ United States. Government Accountability Office. (2005) *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers*. Washington, DC: Government Accountability Office, July, 2005.

¹⁶ Robert L. Borosage, Eric Lotke, and Robert Gerson. (2006). *War Profiteers: Profits Over Patriotism in Iraq*.

B. COMPETING INTERESTS

A significant issue affecting the relationship of security contractors and the government is divided loyalties and goals between the two parties.¹⁷ In a contract award, the government hires contractors to act on their behalf and perform according to the letter of the contract. Sometimes the agreement is not fulfilled because both sides' interests do not coincide with each other, thus the contractors may perform according to their own agendas.¹⁸ This concern arises because private militaries have underlining motivations for profit and satisfying their shareholders.

When the DoD employs security contractors to perform services in Iraq, several issues affect the acquisition and contingency environments. These matters can increase the division between loyalties and goals among the government and private security firms. The following factors add to the issue of divided loyalties in a contingency¹⁹:

- The performance of the contract takes place in a contingency situation that is unpredictable and a highly complex environment.
- Neither side will have complete information about each others motives, interests and goals.
- Private security firm's decisions and actions have a serious effect on the clients.

The profit-seeking nature of these private military companies can easily lead to abuses, such as over billing, taking shortcuts and underperforming. Current contract vehicles, such as cost reimbursable contacting, only adds to this problem. Many experts agree that cost reimbursement contracting incentivizes security firms to raise costs to increase profit margins. This matter is compounded further because the industry lacks adequate competition. The few large companies that dominate the industry take advantage of their market position to secure sole source and long term agreements. Some will even under bid a contract intentionally just to get the award, knowing that they can make back their money and more with modifications and follow-on work.

¹⁷ P. W. Singer. (2003). *Corporate Warriors: Rise of the Privatized Military Industry*. London: Cornell University.

¹⁸ Ibid.

¹⁹ Ibid

The private military industry is one that lacks the control mechanisms needed for a free marketplace, thus causing competition to be fragmented.²⁰ This lack of competition increases the chances of firms getting uncontested awards. Since there are not many firms in the market, companies do not have to try as hard to perform efficiently to get awards. This matter was only compounded during the urgent ramp-up to the Iraq conflict, when certain acquisition “safeguards” were lifted that affect the Competition in Contracting Act (CICA). By law, the Pentagon can circumvent competitive bidding rules in emergency situations, such as war. During the period since 2000, the volume of sole source and other noncompetitive contracts awarded by the military soared 54%, from \$65 billion to \$100 billion. Bush critics say the absence of competition by this legislation has only accomplished “waste and corruption.”²¹

In general, many security contracts in Iraq have little or no oversight. No methods of systematic evaluation are established; many reviews are done on the fly. Contract terms in security contracts are usually undefined, lacking standards, and missing sufficient measures of success. The contractor or agent takes advantage of this environment to enhance their authority, which causes the government to be at their mercy to inform them on measures of performance and success. This is what is believed to have happened during the “train and equip” program in Bosnia, where the military consultant firm exploited their position to take advantage of the government. The contractor’s subject matter expert identified additional unnecessary work, which enabled their company to receive additional contracts and compensation.²² To deal with this issue, there needs to be greater oversight by public authorities to raise these standards. There must be a delicate balance because increased oversight and monitoring typically comes with higher costs that are going to be forwarded on to the government.

²⁰ P. W. Singer. (2003). *Corporate Warriors: Rise of the Privatized Military Industry*. London: Cornell University.

²¹ D. Kopecki. (2006). “When Outsourcing Turns Outrageous.” *Business Week*, (July 31): 54.

²² P. W. Singer. (2003). *Corporate Warriors: Rise of the Privatized Military Industry*. London: Cornell University.

C. MONITORING AND OVERSIGHT

Monitoring and oversight functions of the acquisition process are critical factors to the success of any requirement implementation. Security contractor oversight in Iraq is especially important and made even more difficult because the firm's performance takes place in the "fog of war", where the environment is very unpredictable and highly complex.²³ The following issues are problems facing the government and acquisition community's decision to hire private military firms.

The biggest issue facing contracting for security services in Iraq is that the nature of this service is unique and the environment is unpredictable, which makes a bad situation worse. Contractual issues, such as out of scope work, over charging, lack of accounting, legal abuses and poor performance, happen more often than not because there are not enough eyes on the ground reporting these abuses. With the military stretched as it is, it is very difficult for the government to provide the manpower and time necessary to ensure all aspects of a contract are being accomplished.

The military and contractor abuses at the Abu Ghraib prison in Iraq are an example of the failures of the government to perform adequate oversight and monitoring. The crimes and abuses committed at Abu Ghraib could have been avoided if proper management and oversight were effectively implemented and acquisition procedures were followed. The troubles began early in the contracting process when the contractors, CACI International Inc. (CACI) and Titan Corporation Inc, were awarded the work under an existing blanket purchase agreement (BPA) that was used for information technology (IT) service. The problem is that CACI's contract was awarded for interrogating services, not IT services. This work should have been competed on a new contract. As one investigating officer reported "it is not clear who, if anyone, in the Army contracting legal channels approved the use of the BPA, or why it was used."²⁴ Another violation involving CACI occurred when the contracting official displayed lack of sound business

²³ P. W. Singer. (2003). *Corporate Warriors: Rise of the Privatized Military Industry*. London: Cornell University.

²⁴ Robert L. Borosage, Eric Lotke, and Robert Gerson. (2006). *War Profiteers: Profits Over Patriotism in Iraq*.

judgment and allowed a CACI employee to help write the statement of work for this service, creating a conflict of interest. In part, this continuous lack of regulation and oversight in Iraq reflects the inadequate training many government personnel receive.²⁵

Proper oversight of these security contracts requires appropriate and timely training for individuals. Sadly, in many cases, government personal are offered little or no training to handle discrepancies. Typically, this type of job is not a primary function of that person's daily duties. An example of this was highlighted in a GAO report on the U.S. Balkans logistics contract. It was discovered that the contract ran millions of dollars over budget because of inadequate training of oversight personnel.²⁶ Another issue affecting government training is the high turnover of government personnel, who rotate every few months due to routine deployment cycles. Replacing personnel causes severe loss of knowledge, valuable experience, and job continuity that takes time to replenish.

But training is not only a dilemma on the government side, contractor training is just as big of a factor. The government pays a lot of money for security services and expects to have qualified and trained personnel executing that contract. Unfortunately, this is not always the case and the government may get poorly trained contractors handling life and death situations. The training problems of contractors can be linked to their hiring practices and procedures, as was the case with CACI not providing qualified and experienced workers to perform interrogations. Upon award of the Abu Ghraib contract, they rushed to hire personnel through five minute interviews without checking fingerprints or conducting proper background checks. These same quick hires were involved in the abuses and torture committed at that prison.²⁷

Another example of poor monitoring by the government is the lack of research conducted into the training programs and hiring practices (such as lack of background checks) of these security firms. This area of investigation is crucial to ensuring the

²⁵ Robert L. Borosage, Eric Lotke, and Robert Gerson. (2006). *War Profiteers: Profits Over Patriotism in Iraq*.

²⁶ P. W. Singer. (2003). *Corporate Warriors: Rise of the Privatized Military Industry*. London: Cornell University.

²⁷ Robert L. Borosage, Eric Lotke, and Robert Gerson. (2006, Sept). *War Profiteers: Profits over Patriotism in Iraq*.

government is hiring qualified people with no criminal records or outstanding warrants working in a hostile and fluid combat environment. For example, one questionable training program involves the security contractor company Triple Canopy, who uses only a three week training program to certify their security personnel; one that entails using multiple choice questionnaires to develop a physiological profile, high speed driving drills test and target tests at the firing range.²⁸ Some might believe that this program is hardly a way to screen quality applicants and weed out people of questionable morals. All these issues have a negative impact on the combat environment, introducing untrained people wielding firearms and making life and death decisions. Actions of PMFs in general have a great influence on how Iraqi people view PMFs and the U.S. military.

The lack of proper management with security firms has dire consequences on how the U.S. and its coalition partners are perceived by the Iraqi people. Like it or not, they represent the U.S. and need to be held accountable for their actions. Security contractor's decisions can make the mission of the U.S. military very difficult. An example of the impact contractor actions have on military operations is a 2004 incident in Fallujah; four Blackwater employees were guarding a shipment of supplies and made a wrong turn, causing them to be tortured and murdered by insurgents. Before this event, Marine leadership had planned to play the role of peace keeper, build schools and create goodwill within that community. All that changed with this brutal attack on Blackwater employees – the focus of the Marine strategy switched from winning the hearts to searching for those responsible for this attack. The Marines were now forced into the role of the aggressor, which created an adversarial atmosphere ending months later when the casualties became too high.²⁹ In general, security contractors' actions have the potential to change military operations and divert operational capabilities unnecessarily.

D. COMMAND AND CONTROL CONCERNS

²⁸ Daniel Bergner. (2005, April 14). The Other Army. *New York Times Magazine*, 28-58.

²⁹ Paul Krugman,. (2006). "Tax Farmer, Mercenaries, and Viceroy." *New York Times* (August 21): A-17.

As with many contingency situations, questions arise about deployed contractors and the perceived authority over them. Particularly, where do military commanders fall in their chain of command in a combat environment and the event of emergency? Security contractor duties and scope of work are defined in the contract's statement of work, to which only the contracting officer can direct changes in performance. There can be some disconnect of authority in a contingency location between the commander, contracting officer and the contractor. This was highlighted in a recent DoD report that stated our military forces deployed in Iraq have no command and control authority over security contractors because of non-existent contractual relationships between combat commanders and contractors.³⁰

Even though there is no clear command and control, combatant commanders still have some authority over security contractors, which can best be described as the "inherent authority to protect the health, safety, and discipline" of the people under their area of control. The general authority a field commander possesses is to ensure the contractor follows the rules of engagement for their area of protection. If a contractor fails to follow these policies, they can be restricted from entering the base or using the facilities. Other examples of regulations include traffic rules, weapons policies, a force protection procedure, visitor escort policies, and prohibiting loaded weapons in dining halls.³¹

If a contractor fails to follow the rules, they can be disciplined by the terms of conditions of their contract and terms of their employer agreement. Combatant commanders have no "penal authority" over contractors to direct their activities or "punish any acts of misconduct."³² If someone other than the contracting officer directs a security contractor and they follow through on that order, then other problems are invoked, including ratifications. Ratifications are actions that illegally obligate the government into an agreement to compensate a contractor for goods or services. A more

³⁰ United States. Government Accountability Office. (2005) Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers. Washington, DC: Government Accountability Office, July, 2005.

³¹ Ibid.

³² Joint Publication 4-0 Doctrine for Logistic Support of Joint Operations. (2000).

problematic scenario is that security contractors may lose their life or harm others due to that directed action. This is why it is imperative to establish a clear line of authority in a contingency environment so that all players involved know the rules of engagement. That is why open communication between all the stakeholders is critical to success in Iraq.

Poor communication and lack of oversight can lead to contractors not performing up to the standards listed in the contract. Bad communication between the government and the contractor can have serious consequences, as in the Fallujah incident mentioned earlier involving the deaths of four Blackwater employees. Several key contracting requirements listed in the statement of work were not monitored closely enough. Items reported that violated the contract include³³:

- The contract with the military required that every mission use armored vehicles. The two vehicles sent into Fallujah were not armored.
 - Buying unarmored rather than armored vehicles is estimated to have saved Blackwater \$1.5 million in equipment costs.
- The contract required at least six people on each team: a minimum of two vehicles, each with a driver, a navigator and a heavily armed rear gunner.
 - The victims in Fallujah were on a four person team with no rear gunners and no heavy arms.
- The contract required that Blackwater perform a risk assessment before each trip. No risk assessment was performed before this trip.
 - The team sent into Fallujah had never been there before and did not even have a map

The lack of oversight and clear communication unfortunately lead to the horrific actions at Fallujah that might have been avoided.

With Iraq contractors performing in a combat environment, there is always the issue of contractor reliability. What are the risks if they fail to perform their contracted

³³ Robert L. Borosage, Eric Lotke, and Robert Gerson. (2006, Sept). War Profiteers: Profits over Patriotism in Iraq.

work fully and to the best of their ability (as discussed in the Fallujah incident)? Unwillingness or inability of contractors to perform can occur for several reasons. One reason could be that the contractor has become risk averse to performing in certain situations that might involve threats or attacks. Or they may be inclined to take advantage of the combat situation by threatening to walk if they are not paid more money or have the contract renegotiated in their favor.

Since these PMFs are businesses, they have an incentive to quit at any time and risk losing future contract awards when the situation becomes too financially risky or too dangerous. Such was the case during the summers of 2003 and 2004 in Iraq, when insurgency violence surged. Mass contractor kidnappings and deployment delays caused a significant number of contractors to suspend, delay and even quit their daily operations. These actions caused a huge strain on the military's supply lines and concern for troop safety³⁴. Unlike military members who cannot leave their post, contractors can not be forced to work, be charged with dissertation or face jail time. Contracted employees are not held to the same standards as soldiers and can walk away from a job or contract at any time. This uneasy balance of trust puts the military in a predicament that can seriously impact mission capabilities.

E CHAPTER SUMMARY

Security service requirements are hard to define because they are written to perform in one of the most complex environments possible. To overcome this dilemma, contracting officers must establish “sophisticated mechanisms of monitoring and oversight” to ensure the mission is accomplished.³⁵ Such mechanisms include³⁶:

- statements of work defined with clear and demonstrate-able performance metrics

³⁴ Carparini, Marina., & Schreier, Fred. (2005). Privatising Security: Law, Practice and Governance of Private Military and Security Companies. Geneva Centre for the Democratic Control of Armed Forces (DCAF): Occasional Paper No. 6.

³⁵ Ibid.

³⁶ Carparini, Marina., & Schreier, Fred. (2005). Privatising Security: Law, Practice and Governance of Private Military and Security Companies. Geneva Centre for the Democratic Control of Armed Forces (DCAF): Occasional Paper No. 6.

- appropriate payment provisions with safe guards
- escape clauses that protect stakeholders from unambiguous terms and conditions
- performance incentives
- penalized poor execution

The relationship between the military and security contractors needs to be one of coordination and communications. Contractor performance has come to a point in Iraq that success depends on the success of the insurgent attacks. The mission of U.S. military forces in Iraq is to “to establish and maintain a secure environment, allow the continuance of relief and reconstruction efforts, and improve the training and capabilities of the Iraq Security Forces.”³⁷ To accomplish this mission, acquisition leaders and contracting officers should incorporate disciplinary measures into government contracts and make certain the contractor establishes these term in their employee agreements.³⁸ Management and oversight are critical tools that acquisition leaders need to enforce to ensure the safety of the military, contractors, and civilians alike.

³⁷ United States. Government Accountability Office. (2005) Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers. Washington, DC: Government Accountability Office, July, 2005.

³⁸ Joint Publication 4-0 Doctrine for Logistic Support of Joint Operations. (2000).

IV. ANALYSIS OF LEGAL ISSUES INVOLVING THE EMPLOYMENT OF SECURITY FIRMS

PMFs are of great value to Coalition forces as the newly liberated Iraq starts over – they provide security details and escorts. They help protect oil wells and Iraqi and Coalition officials. They escort convoys as they bring supplies from one location to another, etc. Many news articles are critical of the Coalition's use of PMFs – these individuals are seen and called “mercenaries”, a term which conjures up mental images of money-hungry killers. It appears the U.S. has thumbed its nose at the international community, doing whatever it wants in Iraq. What are the international laws for the use of armed civilians? Are they mercenaries or legal combatants? Who is responsible for ensuring these individuals obey the law? And if these individuals fail to obey the law, what consequences can they expect to face?

A. INTERNATIONAL LAWS AFFECTING SECURITY FIRMS

There are many articles written referring to PMF employees who bear arms as illegal combatants, a statement that implies the conclusion they are not eligible for Prisoner of War (POW) status. Many authors go so far as to call these contractors “mercenaries”. It is shocking to think that the U.S. would openly encourage the use of mercenaries, but even more so that the U.S. would actually employ mercenaries.

Webster's defines a mercenary as “one that serves merely for wages; *especially* : a soldier hired into foreign service”.³⁹ Considering many firms are American owned, operated and hired by the U.S. government, these employees clearly do not meet the generally accepted definition of mercenary. One might argue that these firms are hired by the Iraqi government, so their employees could be argued as, “hired into foreign service”, but why are those employees in Iraq? Is it for monetary reimbursement only? While it could be argued these individuals are motivated by money, it is doubtful that money is their sole motivator. These individuals are motivated by contributing to the war

³⁹ “Mercenary” Merriam-Webster [Electronic version] (2006).

effort. They are energized and excited by the prospect of being able to put to use the skill set they have acquired – many of them through public service – military or police.⁴⁰

The international community does not look to Webster's for its definition of a "mercenary". Instead, the international community references the Geneva Conventions of 1949 for the definition of mercenary, as well as clarification about who is eligible for POW status. The Geneva Convention very clearly states mercenaries do not qualify as legal combatants and are not afforded POW status: "Article 47. Mercenaries: 1. A mercenary shall not have the right to be a combatant or a prisoner of war." There is not much room for interpretation. Mercenaries are not legal combatants and they are not afforded the title POW, upon capture. Do PMF employees qualify as mercenaries? The Geneva Convention has six criteria for mercenaries:

Article 47. Mercenaries

2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.⁴¹

⁴⁰ Singer, P. W. The Private Military Industry and Iraq: What Have We Learned and Where to Next? Geneva Centre for Democratic Control of Armed Forces (DCAF). 2004.

⁴¹ Geneva Convention. (1949). Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Protocol I.

Which, if any of these six criteria do PMF employees meet? At first glance, it might seem the PMF employees meet the criteria to be considered mercenaries in the international community, but on closer inspection, it is clear they do not.

“Recruited locally or abroad … to fight in an armed conflict”; “take[s] a direct part in the hostilities”; “motivated to take part in the hostilities … for private gain and, … is promised, by or on behalf of a Party to the conflict...”⁴² In 2003, once Saddam Hussein’s regime collapsed and the CPA was placed in control of Iraq, it could be argued the “armed conflict” portion ended. President George Bush made that very clear aboard the USS Abraham Lincoln when he declared an end to major combat operations in Iraq. He went on to state the new mission for Coalition forces in Iraq – security. “...my fellow Americans: Major combat operations in Iraq have ended. In the battle of Iraq, the United States and our allies have prevailed. And now our coalition is engaged in securing and reconstructing that country.”⁴³

PMFs were then hired and contracted to supplement security details already provided by Iraqi military members, Iraqi police forces and Coalition forces, who are all trying to maintain peace and order throughout Iraq. Insurgents are not simply fighting Coalition forces – they attack anyone and everyone. Since May 2003, Iraq has begun the long process of trying to establish and maintain law and order. PMFs are paid by the U.S., the CPA or Iraqi government to assist the Iraqi government in this endeavor. Today, when PMFs exchange hostilities, they are not exchanging hostilities with an opposing force, but rather, unruly citizens attacking anyone they so desire. PMF employees fail to meet these first three requirements of the internationally accepted definition of “mercenary”, because they are assisting in the establishment and maintenance of law and order, not recruited by an opposing force to take direct part in hostilities.

⁴² Geneva Convention. (1949). Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Protocol I.

⁴³ Bush, George W. (2003) “Exchange With Reporters Aboard the U.S.S. Abraham Lincoln.” Weekly Compilation of Presidential Documents 38, no., 18 (May 2): 514.

“Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict”; “is not a member of the armed forces ...”; “has not been sent by a State ... on official duty as a member of its armed forces.”⁴⁴ Remember – combat operations ended in May 2003. Since then, Iraq is a young and vulnerable country in a state of violent civil unrest, not a territory under conflict, in the traditional “war” sense of the word. Since no individual country can be considered a “Party to the conflict” – the two sides are simply internal now: Iraq and unlawful, murderous insurgents. Additionally, no PMF employee is still a member of any military – they are all civilians. This can only lead to the conclusion that PMF employees cannot be considered mercenaries under the Geneva Convention, because they fail to meet any of the six requirements that define an individual as a mercenary.

Additionally, in 2001, the United Nations (UN) entered into force the Convention against the Recruitment, Use, Financing and Training of Mercenaries. The convention defines mercenaries exactly as the Geneva Convention, with a few extra conditional statements:

Article 1

2. A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at :

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

⁴⁴ Geneva Convention. (1949). Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Protocol I.

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

Since PMF employees are not mercenaries according to the Geneva Convention, what about The Convention against the Recruitment, Use, Financing and Training of Mercenaries? The convention says individuals are mercenaries if they are “...specially recruited [to participate] in a concerted act of violence [to overthrow] a Government...” or to “[undermine] the territorial integrity of a State.”⁴⁵ Looking at this definition and considering how often PMF employees are called “mercenaries”, it is rather ironic that PMF employees are actually in Iraq for the opposite reason – they are hired to prevent the brand-new Iraqi government from being destroyed by insurgents. It is now very clear that PMFs cannot be considered mercenaries by the 2001 UN Convention, either.

By looking at both conventions and considering all the criteria for an individual to be considered a mercenary by the international community, it is obvious that PMF employees cannot be considered mercenaries. The use of the word “mercenary” is problematic at best, potentially slanderous, at worst. They were not hired for the overthrow of Saddam Hussein’s regime, nor are they present to overthrow the current Iraqi government. PMFs have been hired by the U.S., by the Coalition Provisional Authority (CPA) and the current Iraqi government to assist in security matters throughout the hostile areas of Iraq – they have provided a wide variety of services, from escorting unarmed contractors, to providing security details to high-ranking officials, to protecting oil wells. When PMF employees must exchange hostilities, it is not another “Party of the conflict” they are fighting – it is Iraqi citizens who are trying to overthrow the current Iraqi government.

Even though PMFs are not mercenaries, that does not necessarily guarantee them POW status. Since PMFs are not military members, are armed civilians, but not mercenaries, where do they fit into the Geneva Convention? Actually, the Geneva Convention is quite clear about this issue:

⁴⁵ United Nations. General Assembly. (1999). International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (General Assembly Resolution 44/34)

Protocol I

Section II: Combatants and Prisoners of War

Article 43

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.⁴⁶

The U.S., CPA and Iraqi government have hired various PMFs to assist Iraqi police and military forces in restoring, enforcing and maintaining control throughout Iraq. Even if someone wanted to argue PMF employees are hired by a Party to the conflict, everyone in these dangerous areas is well aware of the civilian security agencies. It would be incredibly difficult for the “opposition” to argue this requirement has not been met.

No international laws have been violated by hiring civilian security contractors. The U.S. and Iraqi governments have done what is necessary to protect the innocent civilians of Iraq, while Iraq begins a new chapter in its history.

B. LEGAL AUTHORITY OVER SECURITY FIRMS

On 1 May 2003, aboard the USS Abraham Lincoln, U.S. President George declared that the Iraqi war was over – combat operations were complete. Once the Iraqi government was removed from power, the U.S. Office of Reconstruction and Humanitarian Assistance (ORHA) stepped in and began to act as a temporary government for Iraq. ORHA was renamed the CPA, headed by L. Paul Bremer. Prior to changing over from the CPA to the new Iraqi government on 1 July 2004, Bremer revised and signed CPA Order 17 on 27 June 2004. CPA Order 17 (revised) addresses jurisdiction over unlawful contractors:

Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts, including licensing and registering employees, businesses and corporations; provided,

⁴⁶ Geneva Convention. (1949). Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Protocol I.

however, that Contractors shall comply with such applicable licensing and registration laws and regulations if engaging in business or transactions in Iraq other than Contracts.

...

Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto. Nothing in this provision shall prohibit MNF Personnel from preventing acts of serious misconduct by Contractors, or otherwise temporarily detaining any Contractors who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State.⁴⁷

This Order turns prosecution, judgment and sentencing of civilian personnel in Iraq over to the Sending State. It is tempting to focus on the verbage “with respect to acts performed by them” while performing work specified in the contract.⁴⁸ In other words, if a security contractor is responsible for guarding an Iraqi official and steals from that Iraqi official, the contractor is then subject to charges by the U.S. government, not the Iraqi government. But, what about a contractor who commits crimes while off-duty? If that same security contractor is in “off-duty” status and robs a store, s/he is then subject to Iraqi prosecution.

The U.S. enacted a law in 2000 that covers on-duty situations, the Military Extraterritorial Jurisdiction Act (MEJA) of 2000, which states:

3261. Criminal offenses committed by ... persons employed by or accompanying the Armed Forces outside the United States

(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within ... territorial jurisdiction of the United States—

(1) While employed by or accompanying the Armed Forces outside the United States; or

...

⁴⁷ Coalition Provisional Authority. (2004). Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq (CPA Order Number 17 {Revised}).

⁴⁸ Coalition Provisional Authority. (2004). Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq (CPA Order Number 17 {Revised}).

(b) No prosecution may be commenced against a person under this section if a foreign government ... has prosecuted or is prosecuting such person for the conduct constituting such offense...

(c) Nothing in this chapter may be construed to deprive a court-martial ... with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial ... ⁴⁹

Item “b” is irrelevant and an impossibility, as long as CPA Order 17 (Revised) is in effect. However, American courts can prosecute lawless contractors performing duties in Iraq. The problem, though, is that for an American court to even charge a lawbreaker, the law(s) broken MUST carry a minimum prison term of one year or more. Offenses which carry fines, probation or confinement less than 12 months are not prosecutable. What about offenses that might be major offenses in the host nation but not in the U.S.? Those offenses are immune by both CPA Order 17 and MEJA – the contractor can escape punishment.

Unfortunately, stories flow out of Iraq about contractors who fail to obey the law while carrying out the terms of their contract. Even worse, none of those stories have resulted in charges against the contractors:

- Custer Battles was found guilty of fraud and ordered to pay over \$10 million for almost 40 counts of fraud. The company will not be required to pay that money, since the CPA passed Order 17. The fact this order prohibits Iraqis from reclaiming any of their \$20 billion spent on contracts has led some to call Iraq a “Free Fraud Zone.”⁵⁰
- In May 2005, two PMF employees guarding the U.S. Embassy in Baghdad shot and killed a civilian. While they were relieved of duty, no charges were filed.⁵¹

⁴⁹ Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523, U.S. Statutes at Large 114 (2000) 2487.

⁵⁰ Charlie Cray. (2006) “The 10 Most Brazen War Profiteers.” Global Policy Forum (September 5)

⁵¹ Jonathan Finer. (2006). “Contractors Cleared in Videotaped Attacks Army Fails to Find ‘Probable Cause’ in Machine-gunning of Cars in Iraq. The Washington Post (June 11) A18.

- In February 2006, two PMF employees in Kirkuk killed two men in a taxi. No charges have been filed.⁵²
- In July 2006, two PMF employees reported a third employee committed murder during patrols in Iraq. No charges have been filed.⁵³

These stories definitely raise concerns about the use of contractors in Iraq. Because none have faced charges, it would seem Iraq is a free zone for lawless contractors and there is no way for them to be held responsible for their actions. Iraq is powerless in charging lawless PMF employees because PMF employees are never truly considered “off-duty.” This means civilian security details can literally do anything while in Iraq without fear of prosecution by the Iraqi government.

C. CHAPTER SUMMARY

The use of PMFs has drawn a lot of attention in recent years, with some questioning the legality of using such armed civilians in Iraq. The problem does not lie in the use of PMFs, but rather in the legal oversight. The U.S. needs to ensure it is keeping a close eye on the behavior of these armed civilians, prosecuting those that have violated the trust placed in them. Close monitoring and a follow-through on MEJA of 2000 is required to reassure the world population of the true value of using these private organizations in support of rebuilding Iraq.

⁵² Jonathan Finer. (2006). “Contractors Cleared in Videotaped Attacks Army Fails to Find ‘Probable Cause’ in Machine-gunning of Cars in Iraq. The Washington Post (June 11) A18.

⁵³ Chivers, C. J. (2006). “Contractor’s Boss in Iraq Shot at Civilians, Workers’ Suit Says.” The New York Times (November 17) A 16.

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V. CONCLUSIONS AND RECOMMENDATIONS

A. INTRODUCTION

The purpose of this MBA project was to identify and examine the major contractual and legal issues facing the DoD and the military's decision to outsourcing security operations in Iraq. This final chapter presents conclusions regarding the contractual and legal implications of using privatized military firms to support Iraqi contingency situations. This chapter also analyzes the security industry as a whole and provides recommendations to enhance the acquisition environment and provide legal suggestions to better use this critical service and improve contracting oversight.

B. CONCLUSIONS

The research and analysis conducted in Chapters III and IV identified several significant issues relating to contractual and legal aspects of employing PMFs in Iraq. Conclusions summarizing these topics are listed below:

1. Monitoring and Oversight Issues

The lack of contractual oversight is quite alarming considering we have been in the Iraq sustainment contingency phase for quite some time. Even though the complex and unpredictable nature of this conflict make it difficult to accomplish some contractual activities, the government must be diligent and use sound business judgment in all decisions and acquisition processes. Failure to accomplish basic oversight will lead to continued cases of poor requirements, overcharging, out of scope work and other abuses.

Education and training for acquisition professionals and security contractors is imperative to eliminating abuses. If we do not use proper training initiatives, we run the risk that more incidents, such as Abu Ghraib, negatively affect the perception of the military across the Muslim world. These unregulated firms sometimes perform actions without receiving clearances, forcing the military to clean up their mess and creating further negative impacts on military missions by of diverting scarce resources.

2. Command and Control

The continual lack of routine oversight has lead to numerous command and control problems regarding the authority the military has over contractors on the battlefield. Only the contracting officer that signed the contract can direct the contractor to perform. Unfortunately, that official is not at the same location as the one who is monitoring contractor performance. That is why clear lines of communication and chains of command between all the stakeholders involved in the contractual process must be defined to prevent future issues.

3. Divided Loyalties

Another significant issue with security firms is the competing interest the firms have with the government. The issue of divided loyalties and goals is a serious concern with any business arrangement. The government must take the necessary steps to turn the contractor's profit seeking nature to their advantage. This can be done by properly incentivizing contractor performance to meet the requirement. Finally, the government needs to address the issue of the PMFs "fragmented industry" and promote adequate competition to prevent instances of contractors exploiting their industry leverage. Otherwise, we run the risk of the contractor holding the government hostage during an emergency to extort more money.⁵⁴ The government needs to promote industry standards of fair and open competition. The government needs to use proper contract vehicles that best fit the requirement and avoid:

- Fixed cost contracts that encourage hiring lower skilled workers to make extra profit
- Cost reimbursement contracts that motivate contractors to raise costs to increase their profit margins.

⁵⁴ Peter W. Singer. (2003). *Corporate Warriors: Rise of the Privatized Military Industry*. London: Cornell University.

4. International Laws Affecting Security Firms

PMFs are not actually mercenaries, despite the overwhelming popular opinion to the contrary. The use of PMFs in Iraq is not a violation of any international laws. Iraq is in a state of disarray, but is trying to turn itself into a civilized society. PMFs are an authorized solution to the difficulties the insurgents have thrust upon the Coalition and Iraqi forces.

5. Legal Authority over Security Firms

The legal authority over PMFs rests solely with the U.S.. The U.S. has the capability and authority to ensure PMFs abide by all laws. The global community, especially the Iraqi people, rely on the U.S. and their use of PMFs to ensure Iraq is able to become a peaceful, productive country.

C. RECOMMENDATIONS

1. Reforming and Streamlining Contingency Contracting

To combat the recurring problems with oversight, contractor reliability and command and control, a comprehensive review of the acquisition process is needed that centers on contractual reforms, such as ones that focus on incentivizing performance and controlling unnecessary contractor expenditures in a contingency environment. The following initiatives will help facilitate such acquisition process reforms:

- Acquisition leadership needs to mandate certain contractual provisions that provide the right financial motivation for contractors to perform their obligation fully and according to the letter of the contract. Incentives such as progress payments, bonuses or award fees for achieving performance metrics.
- Institute liquidated damages clauses to punish contractors for poor performance or missed milestones
- Hire additional trained government and civilian personnel to supplement government contracting employees already working in the field.

- Implement new reporting instructions in contracts that require contractors to adhere to strict “financial reporting and internal control mechanisms by coordinating more closely with combatant commanders and contract monitors.”⁵⁵
- The government should also design tough regulations on contractor involvement in combat contingency environments to determine rules of engagement for their area of performance. These regulations will also help establish direct lines of communication between the security contractor and their contracting officer representative (COR) to handle any questions regarding their contracted service.
- Include policies for screening security contractors employees as they enter a contingency environment and require documentation of all contracted employee training requirements
- Mandate certification and education levels for all acquisition professionals
- Gain knowledge from lessons learned documented in military after action reports

All of these recommended reforms will aid the government in eliminating issues of abuse and failed oversight by placing accountability on the key stakeholders involved. Ultimately, these reforms will foster an environment that focuses on education, training, and providing the right type of motivation for the contractors to accomplish the mission to the best of their ability.

2. Proper Training and Education

Timely and reoccurring programs are needed to educate acquisition professionals to improve the relationship between the contractor and the government. Contract

⁵⁵ Blake W. Mobley. (2004.) “Outsourcing Post-Conflict Operations: Designing a System for Contract Management and Oversight”. *Journal of International Affairs* 15 (Spring): 21-37.

contingency officers in a deployed environment need to be certified and have several years of experience. Contract officer representatives (COR) need to be briefed and certified on contract rules, out of scope work, ratifications and performing within the scope of the contract. Quality assurance representatives are the first line of defense in oversight and monitoring and need to be fully aware of their jobs and expectations. It would also help to have some type of continuity folder or program to address the frequent turnover of contracting personnel and help avoid repeating past mistakes. Most importantly, the shortage of acquisition professionals needs to be addressed. There needs to be an increase in the overall numbers of CORs, Contingency Contract Officers (CCOs) and Quality Assurance Personnel (QAPs) to maintain adequate oversight⁵⁶.

3. Improve Overall Contract Visibility

By strengthening the total number of trained acquisition professionals, we can obtain better contract visibility into accounting methods and contractor performance; little is known about the government's funding to employ these security firms. As P.W. Singer stated in his paper titled "Outsourcing War", we need to "lift the veil of secrecy" and open the books containing contract information and expose fraud, waste and abuse. By doing this, DoD can take a closer look to see if outsourcing security is really working. Specifically, the government needs to determine if we are buying what is required and whether we are getting our money's worth. We can start by requiring contracts to provide more detailed information, including financial statements and a listing of all employees and their salaries under the contract. This information will greatly reduce and deter incidents of possible abuse.⁵⁷

⁵⁶Richard L. Dunn. (2005). Contractors in the 21st Century "Combat Zone". University of Maryland. Center for Public Policy and Private Enterprise.

⁵⁷ P. W. Singer. (2005). "Outsourcing War." Foreign Affairs 84, no. 2 (March/April): 119.

4. Regulations on Both the National and International Levels

To ultimately handle unregulated private military firms and prevent further financial and legal abuses, the government or international bodies need to establish some sort of regulatory framework that follows set procedures⁵⁸:

- Institutes a licensing program that sets clear standards and contracting procedures for security contractors to follow;
- Defines what actions are not allowable and regulates all permissible activities;
- Identifies basic minimum requirements for transparency and accountability of the contractors, and specifies preparation, training, and behavior of the firms and their employees;
- Sets up rules and systems for the screening and vetting the companies and their personnel;
- Creates a monitoring system for PMC and PSC activities;
- Establishes parliamentary or independent oversight of activities;
- Institutes rules that make contracting competitive, fair, and transparent to the public;
- Guarantees funding of all measures required for regulation.

Additionally, other short-term changes can be implemented with minimal time or money investment, which can have a positive and lasting effect. Considering the lack of apparent legal control over contractors in Iraq, it is not a stretch to suggest the insurgency is at least partially fueled by the unlawful and unethical actions of U.S. citizens throughout Iraq. The U.S. needs to remember it is being represented not only by the uniformed DoD personnel throughout the region, but also by the civilians fulfilling

⁵⁸ Marina Caparini and Moncef Kartas. Private Military Companies. Geneva Centre for Democratic Control of Armed Forces (DCAF).

security contracts. For this reason, the U.S. needs to closely monitor the actions of U.S. civilians, as well as U.S. military members. Military personnel are well aware that any unlawful acts can lead to prosecution under the UCMJ. Contractor personnel should be equally aware of possible prosecution in accordance with the MEJA of 2000. While this might not prevent unlawful acts, it will send a definite message to the Iraqi people – the U.S. is interested in truly helping Iraq and U.S. civilians are not free to do whatever they desire without fear of reprisal.

The battle for law and order throughout Iraq is not just being fought in the streets with guns and mortars – the battle is taking place in the minds of the Iraqi public. Each U.S. action (or lack of action) in response to unlawful contractors is dissected, analyzed and conclusions are drawn. For that reason, the trials of civilians should be scheduled post-haste. The message will be clear, showing that the U.S. will not allow its citizens to take advantage of the civil unrest in Iraq for personal gain or enjoyment.

In the long term, lawmakers should consider new legislation. Crimes committed within the U.S. for the sole purpose of being hateful are classified as hate crimes and carry stiffer penalties. Considering the grave consequences of unlawful civilian actions in Iraq, we recommend lawmakers consider specific legislation against laws that directly undermine the Coalition's positive actions in Iraq. This legislation should carry extremely stiff penalties to assist in deterrence. For example, PMF employees who fire their weapons without provocation or for mere sport should face stiff penalties, including the possibility of the death penalty if any innocent Iraqi citizens are killed as a result of these actions. This sends a stiff message that the U.S. recognizes the needs for PMFs and the wonderful contributions these companies make, but cannot tolerate employees who cannot control themselves in Iraq.

D. SUMMARY

With the strength of the insurgency in Iraq growing everyday, the military's use of PMFs will only increase. This billion dollar industry has proven itself a lasting force and will be used more in future conflicts. Privatizing security is a valuable tool for the DoD but only if it saves money and promotes quality. The government will need to

provide the right financial incentives and enforce legal accountability by establishing new terms and conditions in contracts that punish contractor personnel for committing criminal offenses. The best way the government can control PMFs is by utilizing their experienced acquisition professionals and leaders enforce contact documents.

LIST OF REFERENCES

Avant, Deborah. (2004, July/August). Mercenaries [Electronic version]. *Foreign Policy*. 20-26. www.proquest.com. (Accessed December 11, 2006)

Bergner, Daniel. (2005, April 14). The Other Army. *New York Times Magazine*, 28-58. www.proquest.com. (Accessed December 11, 2006)

Borosage, Robert L., Lotke, Eric, & Gerson, Robert. (2006, Sept). War Profiteers: Profits over Patriotism in Iraq. <http://home.ourfuture.org/reports/report-war-profiteers.pdf>. (Accessed December 11, 2006)

Bush, George W. (2003, May 2). Iraq. [Electronic version]. *Address to the nation*. <http://www.gpoaccess.gov/wcomp/v39no18.html>. (Accessed December 11, 2006)

Caparini, Marina and Kartas, Moncef. *Private Military Companies*. Geneva Centre for Democratic Control of Armed Forces (DCAF). <http://www.dcaf.ch>. (Accessed December 11, 2006)

Carparini, Marina., & Schreier, Fred. (2005, Mar). Privatising Security: Law, Practice and Governance of Private Military and Security Companies. *Geneva Centre for the Democratic Control of Armed Forces (DCAF): Occasional Paper No.6*. <http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=18346&nav1=4>. (Accessed December 11, 2006)

Chivers, C. J. (2006, November 17). Contractor's boss in Iraq shot at civilians, workers' suit says [Electronic version]. *The New York Times*. www.nytimes.com. (Accessed November 17, 2006)

Coalition Provisional Authority. (2004). *Status of the Coalition Provisional Authority, MNF-Iraq, certain missions and personnel in Iraq* (CPA Order Number 17 {Revised}). http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. (Accessed December 11, 2006)

Cray, Charlie. The 10 Most Brazen War Profiteers. 5 September 2006. Global Policy Forum. 8 December 2006.

<http://www.globalpolicy.org/security/issues/iraq/reconstruct/2006/0905profiteers.htm>. (Accessed December 11, 2006)

Defense Acquisition University Glossary of Defense Acquisition Acronyms and Terms, 12th Edition [Electronic version]. <http://akss.dau.mil/jsp/Glossary.jsp>. (Accessed December 11, 2006)

Dunn, Richard L. (2005). Contractors in the 21st Century "Combat Zone". *University of Maryland*.

Finer, Jonthan. (2007, June 11). Contractors cleared in videotaped attacks Army fails to find 'Probable Cause' in machine-gunning of cars in Iraq [Electronic version]. *The Washington Post*, pp A18. www.proquest.com. (Accessed December 11, 2006)

Geneva Convention. (1949). *Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Protocol I*.

Joint Publication 4-0: Doctrine for Logistic Support of Joint Operations. (2000, Apr 6). http://www.dtic.mil/doctrine/jel/new_pubs/jp4_0.pdf. (Accessed December 11, 2006)

Kopecki, D. (2006, Jul 31). When Outsourcing turns outrageous. *Business Week*, 54. http://www.businessweek.com/magazine/content/06_31/b3995075.htm. (Accessed December 11, 2006)

Krugman, P. (2006, Aug 21). Tax Farmer, Mercenaries, and Viceroy. *New York Times*, pp. A-17. www.proquest.com. (Accessed December 11, 2006)

Merriam-Webster [Electronic version] (2006). <http://www.m-w.com/>. (Accessed December 11, 2006)

Mobley, Blake W. Outsourcing Post-Conflict Operations: Designing a system for contract management and oversight. *Journal of International Affairs*, Vol 15, Spring 2004

Schumacher, Gerald, Colonel, United States Army (retired). (2006). *A Bloody Business: America's War Zone Contractors and the Occupation of Iraq*. St Paul, Minnesota: Zenith Press.

Singer, P. W. (2003). *Corporate Warriors: Rise of the Privatized Military Industry*. London: Cornell University.

Singer, P. W. (2005, Mar/Apr). Outsourcing War. *Foreign Affairs*, 84(2), 119. <http://www.foreignaffairs.org/20050301faessay84211/p-w-singer/outsourcing-war.html>. (Accessed December 11, 2006)

Singer, P. W. *The Private Military Industry and Iraq: What Have We Learned and Where to Next?* Geneva Centre for Democratic Control of Armed Forces (DCAF). 2004. <http://www.dcaf.ch>. (Accessed December 11, 2006)

Stockman, F. (2006, April 16). US Firms suspected of bilking Iraq funds [Electronic version]. *The Boston Globe*, pp A1. http://www.boston.com/news/world/articles/2006/04/16/us_firms_suspected_of_bilking_iraq_funds/. (Accessed December 11, 2006)

United Nations General Assembly. (1999). International Convention against the Recruitment, Use, Financing and Training of Mercenaries (General Assembly resolution 44/34)

United States. Government Accountability Office. Rebuilding Iraq: Actions needed to improve use of private security providers. Washington: July, 2005.

United States: Government Accountability Office. Rebuilding Iraq: Enhancing security, measuring program results, and maintaining infrastructure are necessary to make significant and sustainable progress. Washington: October, 2005.

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